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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LAUREN MCFADDEN, Plaintiff and Appellant, v. WILLIAM JORDAN ASSOCIATES, INC., Defendant and Respondent.	D070451 (Super. Ct. No. 30-2012-00589220)

APPEAL from an order of the Superior Court of Orange County, Robert D. Monarch, Judge. Affirmed.

Krieger & Krieger, Linda Guthmann Krieger and Lawrence R. Cagney for Plaintiff and Appellant.

Steven A. Fink; and Janice M. Vinci for Defendant and Respondent.

Following the termination of her employment, Lauren McFadden sued her former employer, William Jordan Associates, Inc. (WJA), alleging nine employment-related causes of action. At trial, the jury returned a verdict awarding a total of $9,648 in

damages. McFadden filed a postjudgment motion pursuant to Government Code section 12965, subdivision (b) (§ 12965(b)),[1] in which she requested an award of attorney fees and costs in the amount of $276,684. McFadden appeals from the superior court's denial of her motion, arguing that the court abused its discretion by failing to apply the appropriate legal standard established by our Supreme Court in *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970 (*Chavez*). We disagree and will affirm.

I.

STATEMENT OF THE CASE

For purposes of trial, McFadden and WJA stipulated to the following joint statement of the case.

"This case is brought by [McFadden] against [WJA]. [McFadden] was employed by [WJA] beginning in August 2011 and her employment was terminated in January 2012.[2] [McFadden] claims that she was discriminated against due to her pregnancy and marital status, retaliated against for complaining of discrimination, and terminated due to her pregnancy. [McFadden] claims that these actions by [WJA] caused her emotional distress. In addition, [McFadden] claims that during her employment for [WJA], she was

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1 All subsequent unidentified statutory references are to the Government Code. Section 12965(b) provides in relevant part: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees." Section 12965(b) is part of the California Fair Employment and Housing Act (FEHA), section 12900 et seq.

2 William Jordan, the president and owner of WJA, hired McFadden as his executive assistant.

not paid for overtime worked and was not paid her final wages until several days after her last date of work. [WJA] denies discriminating against [McFadden] based upon her pregnancy or retaliating against [McFadden] due to any complaints of discrimination. While acknowledging that [McFadden] was terminated, [WJA] denies that such termination was related to [McFadden]'s pregnancy. [WJA] also denies that [McFadden] worked any overtime for which payment would be due."

In August 2012, McFadden filed a complaint in the superior court alleging the following nine causes of action against WJA: unlawful discrimination based on gender and marital status (§ 12940, subd. (a)); pregnancy discrimination (§ 12945); retaliation (§ 12940, subd. (h)); failure to prevent discrimination (§ 12940, subd. (k)); wrongful termination in violation of public policy; nonpayment of wages; failure to provide meal and rest periods (Lab. Code, § 226.7); waiting time penalties (Lab. Code, § 203); and intentional infliction of emotional distress.

In March 2014, the court presided over a jury trial. In closing argument, McFadden's counsel asked the jury to award damages of $322,551: $62,994 in lost earnings from the date of termination through trial; $49,920 in future lost earnings; $3,317 in overtime pay; $4,320 in waiting time penalties; $2,000 in medical expenses; and $200,000 in emotional distress.[3]

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3 Actually, counsel asked the jury to award $320,551, but the sum of the individually requested awards totals $322,551. Throughout this opinion, for all dollar amounts listed, we have not included the cents.

After approximately a half day of deliberations, the jury returned the seven-page, 22-question special verdict form. In part, the jury's answers included the following findings: McFadden's pregnancy or marital status was a substantial motivating reason for WJA's decision to terminate McFadden's employment; WJA did not discriminate with malice, oppression or fraud; WJA did not fail to prevent discrimination; WJA's conduct was not outrageous; McFadden did not complain of discrimination to Jordan; WJA did not fail to pay McFadden for any overtime hours she allegedly had worked; McFadden was entitled to an award of $8,640 for all past economic loss (including lost earnings and medical expenses);[4] upon termination of McFadden's employment, for seven days WJA willfully failed to tender the wages owed, which were to be calculated at McFadden's regular (i.e., non-overtime) daily wage of $144 (eight hours at $18 per hour);[5] and McFadden was not entitled to recover damages for future economic loss or for past or future noneconomic loss.[6]

Accordingly, the court entered judgment in favor of McFadden and against WJA in the amount of $9,648 based on McFadden's past economic loss ($8,640) and seven

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4 McFadden tells us that this amount is equal to 12 weeks of lost wages. If true, the jury did not award McFadden anything for her medical expenses.

5 WJA conceded liability on the waiting time claim; the only issue for the jury was the number of days and amount of daily wages.

6 McFadden polled the jury as to nine specific questions, eight of which resulted in no recovery for McFadden, and the ninth resulted in the $8,640 in damages for past economic loss. For all nine questions, the jury's answers were unanimous.

days of penalties for WJA's willful failure to pay wages owed at the time of termination of McFadden's employment ($144/day x 7 days = $1,008).

McFadden filed a memorandum of costs in which she claimed $276,684 — $262,408 in attorney fees and $14,276 in other costs — and a corresponding motion for attorney fees and costs under section 12965(b). In the motion, McFadden contended that she was entitled to such an award, because she "prevailed on the central issue in the case by obtaining a unanimous jury verdict finding that [WJA] discriminated against [McFadden] on the basis of her pregnancy in violation of . . . [section] 12945, and her claim for penalties pursuant to Labor Code [section] 203 based on WJA's failure to pay all wages owed to [McFadden] at the time of her termination." In support of her position on entitlement, McFadden relied on the following evidence: (1) McFadden did not file a limited civil case, because at the time she filed her complaint, the information available to McFadden's counsel was that McFadden would be able to present evidence that her FEHA damages exceeded $25,000, the jurisdictional maximum for a limited civil case (Code Civ. Proc., § 86, subd. (a)(1)); and (2) McFadden obtained a recovery in excess of WJA's Code of Civil Procedure section 998 offer of compromise ($15,000), in that the jury's award of damages ($9,648) together with pre-offer fees and costs ($34,565) exceeded the amount of what McFadden described as WJA's "fee inclusive settlement

offer of $15,000."[7] (Italics added.) McFadden also presented detailed evidence in support of the amount of fees and costs requested.

Following oral argument, the trial court — i.e., the same judge who presided at trial — denied McFadden's motion for attorney fees and costs. The July 14, 2014 written order (Order) provides in relevant part as follows:

> "Assuming that [McFadden] prevailed upon each of her [nine] causes of action, the fees and costs requested appear to be excessive. The court has discretion to deny a request for attorneys' fees on this basis alone. [¶] . . . [¶] The judgment in favor of [McFadden] in the amount of $9,648[] could have been rendered in a limited civil case and could have been rendered in a small claims court.[8] . . . Accordingly, per CCP 1033(a), 1033(b)(1) and *Chavez*[, *supra*,] 47 Cal.4th [970]; *Steele v. Jensen Instruments Co.* (1997) 59 Cal.App.4th 326, the court has discretion to deny fees and costs, notwithstanding the award to [McFadden]."

McFadden timely appealed from the Order.[9]

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7 The parties dispute the effect of WJA's Code of Civil Procedure section 998 offer and, in particular, how McFadden's fees and costs affected the postjudgment section 998 analysis. On appeal, McFadden acknowledges that WJA's offer was "15,000.00 *with each party to bear its own attorneys' fees and costs*" (italics in original), yet argues that, for purposes of determining the prevailing party under section 998, the court is to look at "the jury's award of $9,648 *together with the pre-offer fees* of $32,401.25 *and costs* in the amount of $2,163.78 for a total of $44,213.03" (italics added). Because we are deciding this appeal on other grounds (see pt. II., *post*), we express no opinion on McFadden's suggestion that we compare an offer of compromise that did not include attorney fees and costs with a recovery to which fees and costs are added.

8 "[T]he small claims court has jurisdiction in an action brought by a natural person, if the amount of the demand does not exceed ten thousand dollars ($10,000) . . . ." (Code Civ. Proc., § 116.221.)

9 The Order also denied McFadden's motion to tax WJA's costs. McFadden raises no issue on appeal with regard to WJA's memorandum of costs, her motion to tax costs, or that portion of the Order denying her motion to tax costs.

II.

DISCUSSION

McFadden argues that the trial court erred in denying her motion for section 12965(b) fees and costs by failing to apply the appropriate legal standard established in *Chavez*, *supra*, 47 Cal.4th 970. To the contrary, because the court properly exercised its discretion under *Chavez*, we find no error on appeal.

A. *Law*

We view the Order in a light most favorable to WJA (as the prevailing party in the posttrial proceedings), resolving all conflicts in the evidence in favor of the Order and recognizing all reasonable inferences that may be drawn from the Order. (*Reeves v. City of Burbank* (1979) 94 Cal.App.3d 770, 776 [appeal from order granting attorney fees under the Gov. Code].)

We review the Order for an abuse of discretion. (*Chavez*, *supra*, 47 Cal.4th at p. 989.) " 'The proper exercise of discretion requires the [trial] court to consider all material facts and evidence and to apply legal principles essential to an informed, intelligent, and just decision.' " (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 931.) " 'The scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action . . . ." . . . In other words, judicial discretion must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393, citations omitted [FEHA employment discrimination case].)

We thus consider the trial court's exercise of discretion here, in the context of section 12965(b) and Code of Civil Procedure section 1033, subdivision (a) (Code Civ. Proc., § 1033(a)). As we will explain, section 12965(b) authorizes the discretion not only to award the fees and costs at issue here, but also to deny such fees and costs where special circumstances would render the award unjust. As we also will explain, Code of Civil Procedure section 1033(a) authorizes the discretion to deny fees and costs where a plaintiff obtains a money judgment in an unlimited civil case that could have been brought as a limited civil case.

The Legislature enacted the FEHA "to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination" on account of various characteristics. (§ 12920.) Those characteristics include in part marital status (§ 12940, subd. (a)) and pregnancy (§ 12945). Section 12965(b), which authorizes an employee to bring a civil action for damages based on violations of the FEHA, also provides that "the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees." Awards of attorney fees and costs in FEHA actions both allow for plaintiffs of limited means to bring meritorious claims and encourage litigation of claims that benefit the public interest. (*Chavez, supra,* 47 Cal.4th at p. 984.) Accordingly, a prevailing FEHA plaintiff "should ordinarily recover attorney fees *unless special circumstances would render the award unjust*." (*Id.* at p. 985, italics added.)

Code of Civil Procedure section 1033(a) provides in full: "Costs or any portion of claimed costs shall be as determined by the court in its discretion in a case other than a

limited civil case in accordance with Section 1034 where the prevailing party recovers a judgment that could have been rendered in a limited civil case."[10] Code of Civil Procedure section 1033(a), therefore, "applies when a plaintiff has obtained a judgment for money damages in an amount (now $25,000 or less) that could have been recovered in a limited civil case, but the plaintiff did not bring the action as a limited civil case and thus did not take advantage of the cost- and time-saving advantages of limited civil case procedures." (*Chavez, supra*, 47 Cal.4th at p. 982.) In such a situation, "even though a plaintiff who obtains a money judgment would otherwise be entitled to recover litigation costs as a matter of right, [Code of Civil Procedure] *section 1033(a) gives the trial court discretion to deny, in whole or in part, the plaintiff's recovery of litigation costs*." (*Chavez*, at pp. 982-983, italics added.) That is because the purpose of Code of Civil Procedure section 1033(a) "is to encourage plaintiffs to bring their actions as limited civil actions whenever it is reasonably practicable to do so." (*Chavez*, at p. 988.) In exercising its discretion under Code of Civil Procedure section 1033(a), a trial court should consider "the amount of damages the plaintiff reasonably and in good faith could have expected to recover and the total amount of costs that the plaintiff incurred." (*Chavez*, at p. 984.)

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10 Correspondingly, when a prevailing plaintiff in a limited civil case recovers less than the jurisdictional maximum of the small claims court, "the court may, in its discretion, allow or deny costs to the prevailing party, or may allow costs in part in any amount as it deems proper." (Code Civ. Proc., § 1033, subd. (b)(1).)

In *Chavez*, the Supreme Court held that section 12965(b) and Code of Civil Procedure section 1033(a) can be harmonized; i.e., in a FEHA case, a court of unlimited jurisdiction retains discretion to reduce or deny a prevailing plaintiff's request for fees and costs when the plaintiff recovers less than the maximum recoverable in a court of limited jurisdiction. (*Chavez, supra*, 47 Cal.4th at p. 986.) "In exercising its discretion under [Code of Civil Procedure] section 1033(a) to grant or deny litigation costs, including attorney fees, to a plaintiff who has recovered FEHA damages in an amount that could have been recovered in a limited civil case, the trial court must give due consideration to the policies and objectives of the FEHA and determine whether denying attorney fees, in whole or in part, is consistent with those policies and objectives. If so, the plaintiff's failure to take advantage of the time- and cost-saving features of the limited civil case procedures may be considered a special circumstance that would render a fee award unjust." (*Chavez*, at p. 986.) In reaching this conclusion, the Supreme Court summarized and cited approvingly the Court of Appeal's conclusion in *Steele v. Jensen Instrument Co.*, *supra*, 59 Cal.App.4th 326 (*Steele*): "[W]hen the amount of damages that a FEHA plaintiff recovers in superior court could have been awarded by a court of lesser jurisdiction (at that time, the municipal court), *the trial court has discretion to deny costs, including attorney fees, to the plaintiff*." (*Chavez*, *supra*, 47 Cal.4th at pp. 987-988, citing *Steele*, at p. 331, italics added.)

In addition, as applicable here, a " 'fee request that appears unreasonably inflated' " is another " 'special circumstance' " for FEHA purposes that also " 'permit[s] the trial

court to reduce the award or deny one altogether.' " (*Chavez, supra*, 47 Cal.4th at p. 990, quoting from *Serrano v. Unruh* (1982) 32 Cal.3d 621, 635.)

B. *Analysis*

In *Steele, supra*, 59 Cal.App.4th 326, the plaintiff brought a FEHA action in superior court (before the unification of the municipal and superior courts) against her employer and two individuals based on alleged pregnancy discrimination. (*Id.* at p. 328.) A jury trial resulted in an award of $21,078 in damages. (*Ibid*.) Because the damage award was less than $25,000, and thus could have been recovered in a court of limited jurisdiction (then, the municipal court), the trial court relied on Code of Civil Procedure section 1033(a) and denied the plaintiff her attorney fees and costs. (*Steele*, at pp. 329-330.) The Court of Appeal affirmed, holding that because the plaintiff could have recovered those damages in a court of lesser jurisdiction, the trial court did not abuse its discretion denying plaintiff's motion. (*Id.* at p. 331.)

In *Chavez, supra*, 47 Cal.4th 970, the plaintiff brought a FEHA action in superior court against his employer and two individuals alleging claims for employment discrimination and harassment on the basis of a perceived mental disability and unlawful retaliation for having filed FEHA administrative complaints and prior state and federal court actions asserting the FEHA claims. (*Id.* at p. 980.) After recovering $11,500 on one claim, the plaintiff brought a section 12965(b) motion for $884,079 — $870,935 in

fees and $13,144 in costs.[11] (*Chavez*, at pp. 980-981.) Guided by *Steele*, *supra*, 59 Cal.App.4th 326, the trial court in *Chavez* denied plaintiff's motion. (*Id.* at p. 981.) The Court of Appeal reversed the trial court "for making no express finding of a special circumstance that justified denying attorney fees to a prevailing FEHA plaintiff." (*Id.* at p. 982.) In particular, the Court of Appeal agreed with the plaintiff's attorney that the plaintiff could not have filed the action as a limited civil case because it involved complex causes of action against four defendants and the plaintiff could not have conducted appropriate discovery (e.g., more than one deposition (see generally Code Civ. Proc., § 94)). (*Chavez*, at p. 982.) The Supreme Court reversed, ruling that an appellate court "ha[s] no reason to question the trial court's implied determinations" of the following special circumstances that would render a fee award unjust: (1) the requested fees were unreasonably inflated; and (2) the action fairly and effectively could have been litigated as a limited civil case. (*Id.* at pp. 990-991.)

For purposes of comparison, in the present appeal McFadden recovered $9,648 in her FEHA superior court action and brought a section 12965(b) motion for costs in the amount of $276,684 — $262,408 in attorney fees and $14,276 in other costs.

We are not persuaded by McFadden's principal argument that the trial court abused its discretion by "repeatedly declin[ing] to address the *Chavez* standards" despite

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11 The plaintiff's original motion sought $436,602 in fees based on approximately 1,850 hours and $13,144 in costs, but the plaintiff later amended his motion to correct errors and added "a '2x' multiplier to the 'lodestar' calculation." (*Chavez*, *supra*, 47 Cal.4th at p. 981.) This resulted in the ultimate request for $870,935 in fees and $13,144 in costs. (*Id.* at p. 981.

"McFadden's counsel's repeated requests that the court consider the *Chavez* factors." According to McFadden, because the court did not make findings on the issues McFadden believes were important or answer specific questions posed by her attorney at oral argument, the court necessarily failed to apply the appropriate legal standard.

To the contrary, in the Order the court here expressly relied on the two "special circumstances" described *ante* that would render a fee award unjust according to *Chavez, supra,* 47 Cal.4th at pages 990-991: (1) the requested fees were unreasonably inflated; and (2) the action fairly and effectively could have been litigated as a limited civil case.[12] We discuss each of these special circumstances *post*.

In a related argument, McFadden relies on comments from the bench during the hearing — mostly in response to her attorney's questions to the court — that she contends establish the court's failure to analyze or properly apply the *Chavez* standards. (See fn. 12, *ante*.) Very simply, McFadden attempts to use the court's oral comments to impeach the court's written order filed almost three weeks later. However, "oral remarks or comments made by a trial court may not be used to attack a subsequently entered order or judgment." (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1009;

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12 Throughout her opening brief, McFadden criticizes the trial court for not applying what she characterizes as the "*Chavez* standards" or the "*Chavez* factors" without expressly telling us what she contends these standards or factors are. We understand McFadden's argument to be that the trial court did not properly consider and/or apply what the *Chavez* court (and we in this opinion) refer to as the "special circumstances" that would render unjust an award of fees and costs under section 12965(b). (See *Chavez, supra,* 47 Cal.4th at pp. 990-991.) To the extent McFadden meant anything else, we deem her argument forfeited based on the " 'absence of cogent legal argument or citation to authority.' " (*San Diegans for Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416, 440; see Cal. Rules of Court, rule 8.204(a)(1)(B).)

accord, *Jie v. Liang Tai Knitwear Co.* (2001) 89 Cal.App.4th 654, 667, fn. 9 [trial court's remarks "not embodied in the written findings or judgment . . . may not be used to impeach the findings" actually made].) We are reviewing the Order, not the court's comments made during oral argument.

Like the trial court, we too find *Steele* persuasive[13] and *Chavez* controlling. Based on the record in the present appeal and the Supreme Court's guidance in *Chavez*, we have no reason to question the trial court's determinations — whether express or implied — that the fees and costs requested by McFadden were unreasonably inflated, and that the action could have been litigated as a limited civil case. Thus, as we explain, after analyzing the arguments and record on appeal, we have no reason to question the exercise of the trial court's discretion.

1. *Unreasonably Inflated Fees*

" ' "The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong['] " — meaning that it abused its discretion.' " " 'We defer to the trial court's discretion "because of its 'superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.' " ' " (*Taylor v. Nabors Drilling*

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13 We disagree with McFadden's suggestion that *Steele* "is of limited precedential value" since it was decided 13 years before *Chavez*. In reaching its conclusions in *Chavez*, the Supreme Court cited *Steele* favorably at least twice (*Chavez, supra*, 47 Cal.4th at pp. 976, 987-988) and expressly relied on *Steele* at least twice (*Chavez*, at pp. 989, 991).

USA, LP (2014) 222 Cal.App.4th 1228, 1249 [defendant's appeal from grant of FEHA plaintiff's § 12965(b) motion].)

Contrary to McFadden's argument on appeal, there is no indication that the trial court here denied her motion based on "the comparison of the *proportionality* of the fee request to the amount recovered" — i.e., $276,684 requested on a $9,648 recovery. Rather, the court appears to have followed *Chavez*'s direction for cases where a plaintiff is only partially successful on the claims she prosecuted — which to a certain extent expressly authorizes the court to consider the relationship between the fees requested and the amount recovered. "If a plaintiff has prevailed on some claims but not others, fees are not awarded for time spent litigating claims unrelated to the successful claims, and the trial court 'should award only that amount of fees that is reasonable in relation to the results obtained.' [(*Hensley v. Eckerhart* (1983) 461 U.S. 424, 440.)] Although attorney fees need not be strictly proportionate to the damages recovered (*Riverside v. Rivera* (1986) 477 U.S. 561, 574), '[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief [citation], the only reasonable fee is usually no fee at all[.]' "[14] (*Chavez, supra,* 47 Cal.4th at p. 989.)

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14 By this quotation, we are not expressing an opinion that McFadden's $9,648 in damages are "nominal"; nor are we suggesting that McFadden failed to prove an essential element of any of her claims. Rather, we are relying on language from our Supreme Court in a case where the FEHA plaintiff "recovered damages of $11,500, which is less than half of the $25,000 jurisdictional limit for a limited civil case." (*Chavez, supra*, 47 Cal.4th at p. 976.) Notably, McFadden recovered even less than the plaintiff in *Chavez* — which makes McFadden's judgment not only less than half the jurisdictional limit for a limited civil case, but also, as the trial court noted, a judgment that "could have been rendered in a small claims court."

Once again, in her complaint McFadden alleged nine causes of action against WJA; she prevailed on two, and in one of them she had received WJA's concession of liability shortly before trial. In the Order, the trial court found that *even if* it assumed that McFadden prevailed on each of her causes of action, "the fees and costs requested appear to be excessive," noting that it had discretion to deny McFadden's motion "on this basis alone."

Indeed, the record here is stronger than that in *Chavez* for a denial of all fees and costs. In *Chavez*, after reaffirming that an " 'unreasonably inflated' " request is a sufficient " 'special circumstance' " to deny the plaintiff's section 12965(b) motion, the Supreme Court first credited the trial court with the *implied* finding that the requested award of fees and costs in that case was "grossly inflated" and then concluded by ruling that the court did not err in denying the motion in its entirety. (*Chavez*, *supra*, 47 Cal.4th at pp. 990-991.) Here, since the trial court provided an *express* finding that the fees and costs requested by McFadden "appear to be excessive"; *Chavez* fully supports the conclusion that the court applied the proper standard and did not err in denying McFadden's motion in its entirety.

2. *Limited Civil Case*

In support of her section 12965(b) motion, McFadden submitted a declaration from one of her trial attorneys who explained the bases for the attorney's decision to file the action as an unlimited civil case. In summary, counsel testified that, prior to filing the action as an unlimited civil case: (1) she had investigated the facts, discussed the case

with other attorneys in her firm, believed that WJA's treatment of McFadden violated the FEHA, familiarized herself with reports of jury verdicts in similar cases, and concluded that McFadden had a reasonable expectation of recovering damages in excess of $25,000; and (2) the complexity of McFadden's claims could not be litigated effectively as a limited civil case because of the limitation on discovery in such cases. Based on this evidence, McFadden argues on appeal that "[n]othing in the record of this case could have 'firmly persuaded' the Superior Court that McFadden's attorneys had no reasonable basis to anticipate a FEHA damages award in excess of $25,000." McFadden emphasizes the "extensive experience in employment litigation" of her trial attorney.

McFadden essentially argues that the trial court was *required* to credit the evidence her attorney presented and *required* to conclude that the action could only be prosecuted fairly and efficiently as an unlimited civil case. We disagree.

To the extent McFadden is asking that *we* credit counsel's testimony or reweigh the evidence counsel submitted in support of the section 12965(b) motion, an appellate court may not do so. "Such matters do not present any question of law for appellate review since they turn upon the trial court's appraisal of the evidence on the question and the reasonable inferences to be drawn therefrom." (*Beck v. Weather-Vane Corp.* (1960) 185 Cal.App.2d 688, 694.)

We once again find guidance from our high court in *Chavez*: "The trial court was familiar with all of the trial proceedings and with the evidence presented at trial. It was therefore in a much better position than this court, or the Court of Appeal, to determine whether this action could fairly and effectively have been litigated as a limited civil case

and also whether plaintiff's attorney should have realized, well before the action proceeded to trial, that plaintiff's injury was too slight to support a damage recovery in excess of $25,000. We have no reason to question the trial court's implied determinations on these points." (*Chavez, supra,* 47 Cal.4th at p. 991.) Likewise, here we have no reason to question the trial court's implied determinations on these points — especially since the court here (unlike in *Chavez*) provided an *express* finding that the judgment "could have been rendered in a limited civil case and could have been rendered in a small claims court." We do not read the court's comment as a statement of fact based on the results of the trial, but rather — given the context of the statement and the court's citations to *Chavez, Steele* and Code of Civil Procedure section 1033(a) — as the court's finding regarding whether the action could fairly and effectively have been litigated as a limited civil case.

We disagree with McFadden's suggestion that the trial court "penalized" counsel "through the application of hindsight." We recognize that, in determining whether an action could fairly and effectively have been prosecuted as a limited civil case, the trial court may not exercise " 'hindsight bias,' which is the recognized tendency for individuals to overestimate or exaggerate the predictability of events after they have occurred." (*Chavez, supra,* 47 Cal.4th at pp. 986-987.) However, as we explained in the immediately preceding paragraph, the trial court can only make this determination based on its "familiar[ity] with all of the trial proceedings and with the evidence presented at trial." (*Id.* at p. 991.) Merely because the court rejected McFadden's counsel's testimony

does not mean (or even imply) that the court inappropriately overestimated or exaggerated the predictability of the events after they had occurred.

For these reasons, based on its finding that the action could have been prosecuted as a limited civil case, the trial court did not err in denying McFadden's motion in its entirety.

3. *Conclusion*

The present appeal parallels *Chavez* closely. In *Chavez*, like here, the trial court determined that the plaintiff's excessive fee request was sufficient to deny the section 12965(b) motion. (*Chavez*, *supra*, 47 Cal.4th at p. 991.) In *Chavez*, like here, the trial court determined that the action should have been brought as a limited civil case.[15] (*Ibid.*)

Finally, in *Chavez*, in addition to these two determinations, the Supreme Court relied on the trial court's statement that "it had been 'guided by' *Steele*" in reaching its decision to deny the section 12965(b) motion. (*Chavez*, *supra*, 47 Cal.4th at p. 991.) Here, in addition to the same two determinations, the trial court expressly cited *Chavez*, *Steele* and Code of Civil Procedure section 1033(a). Accordingly, as in *Chavez*, based on the trial court's explanation of the reason for its decision in the Order, we are confident the trial court knew and applied the appropriate standard under section 12965(b).

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15 *Either* of these two determinations was a sufficient independent basis on which to have denied the section 12965(b) motion. (*Chavez*, *supra*, 47 Cal.4th at p. 991.)

Based on the foregoing, the trial court did not abuse its discretion in denying McFadden's section 12965(b) motion.

DISPOSITION

The Order is affirmed. In the interests of justice, the parties shall bear their own costs on this appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

IRION, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.